Division of Insurance, Petitioner
v.
John W. Snape, a/k/a John W. Snape, Sr., Respondent

Docket No. E2004-04

Order on Petitioner's Motion for Summary Decision

Introduction and Procedural History

On January 26, 2004, the Division of Insurance ("Division") filed an Order to Show Cause ("OTSC") against John W. Snape, Sr. ("Snape"), a licensed Massachusetts insurance producer, alleging that he had marketed an unlicensed health plan to Massachusetts consumers. It sought orders that Snape had failed to maintain the qualifications required of insurance agents and brokers under, respectively, G.L. c. 175, §163 and §166, and the qualifications to hold an insurance producers license under G.L. c. 175, §162R. The Division alleged that Snape's sales of the health plan violated G.L. c. 175, §3, constituted an unfair or deceptive practice prohibited under G.L. c. 176D, §2, and that, in marketing the health plan, Snape made misrepresentations that violated G. L. c. 176D, §3(1). It asked for revocation of Snape's licenses and for orders requiring him to reimburse consumers for any unpaid medical bills, prohibiting him from transacting insurance business in Massachusetts, and imposing fines.

The Commissioner designated me as presiding officer for this proceeding. A Notice of Procedure ("Notice") issued on January 28, 2004, advising Snape that a hearing on the OTSC would be held on March 10, a prehearing conference would take place on February 26, and that the proceedings would be conducted pursuant to G.L. c. 30A and the

Standard Adjudicatory Rules of Practice and Procedure, 801 CMR 1.00, *et seq*. The Notice advised Snape to file an answer pursuant to 801 CMR 1.01(6)(d). It also stated that, if Snape failed to file an answer, or failed to appear at the prehearing conference or hearing, the Division might move for an order of default, summary decision or decision on the pleadings granting it the relief requested in the OTSC, and that such an order against Snape might be entered.

On January 29, the Division sent the respondent copies of the Notice and OTSC by certified mail and by regular first class mail, addressed to his post office box in Fitchburg, Massachusetts. Snape did not appear at the prehearing conference on February 26. Douglas Hale, Esq., counsel for the Division in this matter, stated that both copies of the Notice and OTSC sent to respondent in Fitchburg had been returned, with a note that the post office box was closed. The Division then located an address for respondent in Centerbrook, Connecticut and attempted to serve him there by regular and certified mail. Both mailings were again returned. Mr. Hale reported that the Division had located a third address for respondent, and that it would now file an amended order to show cause ("AOTSC"). He requested that a new Notice of Procedure issue.

The AOTSC was filed on March 4, 2004, and a second Notice of Procedure ("Second Notice") was issued on that same date. The AOTSC reiterated the OTSC, but added the following allegations: 1) John W. Snape, who has the same social security number as John W. Snape, Sr. was issued a Connecticut resident producer license in February 2004; 2) Snape never notified the Division that he had changed his residence from Massachusetts to Connecticut, as he is required to do pursuant to G.L. c. 175, §162N (c); and 3) Snape's marketing of the health plan failed to identify the insurance carrier, thus violating 211 CMR 40.04. The Second Notice set prehearing conference and hearing dates of April 13 and April 27, respectively. The Division filed a certificate of service on March 4, stating that it had sent copies of the AOTSC and the Second Notice to Snape by certified and by first class mail at an address in Old Lyme, Connecticut. On March 18, the Division filed a receipt for the certified mail sent to Snape at the Old Lyme address. The receipt appears to bear Snape's signature and is dated March 11. Snape filed no answer or other responsive pleading to the AOTSC.

Neither Snape nor any person representing him appeared at the April 13 prehearing conference. Mr. Hale reported that he had received no oral or written communications from Snape or any counsel representing him, and stated that the Division would file a motion for summary decision. That motion was filed on April 22. With it, the Division filed two supporting affidavits, one from Mr. Hale (the "Hale April 21 Affidavit") and one from Richard Kirkpatrick (the "Kirkpatrick Affidavit"), and a certificate of service. On April 23, I issued a written order requiring Snape to file any response to the Division's motion by May 3, and continuing the hearing scheduled for April 27 to May 6. The order also advised Snape that argument on the motion would be heard at that time. On May 6, the Division filed a second affidavit (the "Hale May 6 Affidavit") from Mr. Hale in support of its motion for summary decision. Snape submitted no response to the Division's motion, and failed to appear at the May 6 hearing. Mr. Hale stated that, since the April 13 conference, he had received no oral or written communication from Snape or from any person representing him. I took the Division's motion under advisement and now allow it.

Finding of Default

On the basis of the record before me, I conclude that the Division took appropriate actions to ensure proper service, and that sufficient service was made.[1] The OTSC and Notice were initially sent to respondent at the address shown on the Division's licensing records. While such notice, by itself, satisfies the notice requirement set out in G.L. c. 175, §174A, the Division went beyond that requirement, and eventually located an address in Old Lyme, Connecticut for John W. Snape, whose social security number matched that on file with the Division for John W. Snape, Sr. Service was made on Snape by certified mail to his Old Lyme address. It appears that Snape signed for the AOTSC on March 11, 2004. No response was filed claiming that the individual on whom the AOTSC was served is not the person named in it as respondent. Therefore, I am persuaded that adequate service was made on Snape. I conclude that Snape's failure to answer the AOTSC or to respond to the

[1] I note that G.L. c. 175, §174A provides that notices of hearings in matters involving revocation of licenses "shall be deemed sufficient when sent postpaid by registered mail to the last business or residence address of the licensee appearing on the records of the commissioner. . . ." This section, however, does not require that notices of hearing must be sent by registered mail; nor does it provide that registered mail is the only method of service which may be found to be sufficient.

Division's motion, and his failure to appear at the scheduled prehearing conference or at the hearing warrant findings that he is in default. By his default, Snape has waived his right to proceed further with an evidentiary hearing in this case and I may consider the Division's motion for summary decision.

Findings of Fact and Conclusions of Law

On the basis of the record before me, consisting of the OTSC, the AOTSC, the memorandum in support of the Division's motion for summary decision, the Kirkpatrick Affidavit and the Hale April 21 and May 6 Affidavits, I find the following facts:

1. Respondent John W. Snape was first licensed as an individual insurance agent in Massachusetts on or about December 17, 1987, and was first licensed as an insurance broker on or about January 17, 1997. Since on or about May 16, 2003, he has been licensed as an insurance producer. Snape's mailing address, as shown on the Division's licensing records, is P. O. Box 2305, Fitchburg, Massachusetts.
2. Effective February 1, 2004, Snape was issued a resident producer license by the State of Connecticut. Snape did not inform the Division that he had changed his residence from Massachusetts to Connecticut.
3. Snape marketed in Massachusetts a health insurance plan (the "Health Plan") from Employers Mutual, LLC ("Employers Mutual"). Employers Mutual, which has a business address in Nevada, was not licensed to conduct an insurance business in Massachusetts. Furthermore, the Division did not approve any policy forms or rates for the Health Plan.
4. Snape negotiated, solicited, sold or aided in selling the Health Plan to at least four business entities and one family group in Massachusetts; the plans he sold covered at least twenty-five Massachusetts residents.
5. The Health Plan was never underwritten by an insurance carrier, as defined in 211 CMR 40.03. Snape, therefore, in marketing the Health Plan, did not identify the name of the carrier.
6. Claims were submitted to Employers Mutual for medical services provided to people who, as result of Snape's sales activities, were enrolled in the Health

Plan. Employers Mutual failed to pay claims submitted by or on behalf of nine individuals. The unpaid claims total $4,861.33.

Discussion and Analysis

The Division initiated this action in response to information from the Nevada Department of Insurance that identified Snape as an agent or broker for Employers Mutual and specified the Massachusetts residents who were covered under the policies he placed with the Health Plan. The Kirkpatrick Affidavit states that, by letter dated January 20, 2002, Snape confirmed the names of the business organizations and the one non-employer to which he had sold the Health Plan and the names of the individuals insured as a result of those sales. The Division argues that Snape's conduct violates sections of G.L. c. 175 and of c. 176D, as well as G.L. c. 175, §162N (c), and seeks fines and other relief pursuant to those statutes. It also seeks revocation of his licenses, and orders prohibiting him from engaging in the business of insurance in Massachusetts. Its arguments and requests will be considered *seriatim*.

First, the Division asserts, G. L. c. 175, §3, prohibits negotiating, soliciting, selling or aiding in the transaction of insurance contracts except as authorized by c. 175, c. 176, or as otherwise expressly authorized by law. It argues that Snape violated this statute at least twenty-five times by selling the Health Plan to Massachusetts residents, and that, under G.L. c. 175, §194, he is subject to a fine of up to $500 for each violation. Those same sales, the Division argues, violate G. L. c. 176D, §2 and §3 (1). Under G.L. c. 176D, §7, the Division notes, the Commissioner may impose a fine of $1,000 for each violation of c. 176D.

The Division asserts that Snape's conduct violated G.L. c. 175, §3, because Employers Mutual was not licensed to conduct an insurance business in Massachusetts and the Commissioner did not approve policy forms or rates for the Health Plan. However, those allegations, and the statements in the affidavits supporting the Division's motion for summary judgment, even if accepted as fact, do not, without more, demonstrate that Snape's sales violated c. 175. The Hale April 21 Affidavit describes Employers Mutual as a corporation that offered employers an opportunity to enroll in an association through which they could obtain health insurance. It further states that Employers Mutual represented that the health coverage would be underwritten by an insurance company.

Accepting those statements as presented, however, calls into question whether Employers Mutual was acting as a risk-bearing entity that would have required a license to conduct business in Massachusetts or was acting in a capacity that did not require licensure, such as a third party administrator. Further, because the insurance was marketed to employers, it is not clear whether the Health Plan contract was a policy that could be sold only after its forms and rates had been filed and approved under G. L. c. 175, §108, or was a group policy which, under G.L. c. 175, §110, need not be approved prior to use. On this record, then, I am unable to determine that Snape's sales violated G. L. c. 175, §3.

Chapter 176D prohibits any person engaged in the business of insurance from engaging in trade practices that constitute unfair methods of competition or unfair or deceptive acts or practices. Under G. L. c. 176D, §2 and §6, the Commissioner may find that particular activities, in addition to those specified in G. L. c. 176D, §3 and other sections of the insurance statutes, constitute prohibited trade practices. By offering the Health Plan to Massachusetts employers, Employers Mutual was engaged in the business of insurance in the Commonwealth. Further, the failure of Employers Mutual to obtain insurance coverage, after representing that an authorized insurer would underwrite the Health Plan, meant that the Health Plan it offered was uninsured. I find that Snape, in his capacity as an agent, broker or producer licensed and actively engaged in the business of insurance in Massachusetts, marketed an uninsured Health Plan to residents of Massachusetts, and that sales of an uninsured product offering health coverage are unfair or deceptive trade practices. Therefore, I find that Snape's conduct violated G.L. c. 176D, §2.

G.L. c. 176D, §3 (1) in general, prohibits misrepresentation and false advertising of insurance policies. The Division's argument that Snape's conduct violated G.L. c. 176D, §3 (1) is two-pronged. First, in the memorandum supporting its motion for summary decision, the Division argues that Snape violated that section because, in representing that he was selling a health plan, he tacitly represented that medical claims would be paid when submitted, even though the Health Plan did not pay claims which were submitted to it. Second, the Division asserts that Snape violated G. L. c. 176D, §3 (1) because, in marketing the Health Plan, he failed to clearly identify the name of the carrier,

as 211 CMR 40.04 (1) required him to do.[2] Its allegation is based on the premise that, because an insurer never underwrote the Health Plan, Snape could not have identified the carrier. However, the Hale April 21 Affidavit indicates that Employers Mutual represented that the Health Plan would be underwritten by an authorized insurer, but in fact never actually procured the insurance coverage. In essence, the Division argues it would therefore have been impossible for Snape to identify the name of the carrier underwriting the Health Plan. It does not consider, however, what Snape knew or should have known about the Employers Mutual Health Plan, based on representations made to him, or what he then stated to consumers. Because the record incorporates no information, either in the form of documents or testimony, on Snape's actual presentations to consumers, I am unable to determine what his marketing materials disclosed to consumers about Employers Mutual or the Health Plan, and whether he thereby violated G. L. c. 176D, §3. However, as noted above, I have already found that Snape violated G.L. c. 176D §2 because he sold an uninsured health plan.

Based on my determination that Snape, a person licensed to engage in the business of insurance, has committed unfair and deceptive acts or practices, I further find that fines should be imposed pursuant to G.L. c. 176D, §7. The maximum fine under that statute is $1,000 for each violation. The uninsured Health Plan that Snape marketed was purchased by four employers and one non-employer group, and purported to cover, in total, twenty-five individuals. I find that, each time Snape enrolled a person in the uninsured Health Plan, he committed a separate violation of G. L. c. 176D, §2, and that it is therefore appropriate to impose on him a fine of Twenty-five Thousand Dollars ($25,000) for such violations.

The Division also asks that additional fines be imposed pursuant to G. L. c. 175, §162R (a) which permits the Commissioner to levy a civil penalty in accordance with G. L. c. 176D, §7 for a series of causes including, in subsection (a)(2), violations of the insurance laws and regulations. Violations of G. L. c. 175, §162R (a) provide an independent basis for fining Snape. However, because Snape has already been fined to the maximum prescribed under c. 176D for marketing an uninsured health plan, imposition of

[2] 211 CMR 40.00 addresses the marketing of insured health plans; Section 40.01 states that the regulation is intended to define misleading or misrepresentative practices in the marketing of health insurance under c. 176D, §3.

a fine under §162R for the same offense would effectively double the allowable fine. I therefore decline to take such action. However, Snape has also violated G. L. c. 175, §162N (c) because, when he obtained a resident producer license in Connecticut, he failed to file a change of address with the Division and to provide certification from the new state of residence within thirty days of changing his legal residence. I will therefore impose a separate fine of One Thousand Dollars ($1,000) for that violation.

G. L. c. 176D, §7, as well as permitting the imposition of fines, allows the Commissioner to order restitution by an insurer or its agent to any claimant who has suffered economic damage as a result of violations of c. 176D. I will therefore order Snape, as an agent marketing the Health Plan, to make restitution to the individuals he enrolled in the Health Plan for all claims submitted to Employers Mutual, either directly by the enrolled individuals or by health care providers on their behalf, that Employers Mutual has failed to pay. A document from counsel to the fiduciary appointed by the United States District Court for Nevada to preside over a quasi-bankruptcy proceeding for Employers Mutual, attached to the Hale May 6 Affidavit, identifies the claims submitted by or on behalf of individuals covered under Health Plans sold by Snape. Based on that document, I find that the claims submitted to date total Four Thousand Eight Hundred Sixty-one Dollars and Thirty-three Cents ($4,861.33). I note, as well, that G.L. c. 175, §171, establishes that an insurance agent is personally liable on all contracts made through him for or on behalf of a company not authorized to do business in Massachusetts. Because the record provides limited information on Snape's marketing of the Health Plan in Massachusetts, I am unable to determine whether Snape's marketing materials directly or indirectly characterized Employers Mutual as an insurer. To the extent that those marketing materials represented Employers Mutual to be an insurer, any contract with it would have been made on behalf of a company not authorized to do business in Massachusetts. Snape would then also be personally liable, by statute, on those contracts which were made through him.

The Division seeks revocation of Snape's licenses under three statutes. First, it notes, G. L. c. 176D, §7 allows the Commissioner, to revoke the license of a person charged with repeated violations of §3. Second, because Snape is currently licensed in Massachusetts as an insurance producer pursuant to G.L. c. 175, §§162G-162X, the

Division seeks revocation of his license pursuant to G. L. §162R (a), which specifies fourteen grounds on which the Commissioner may revoke a producer's license. The Division identifies five subsections of G. L. §162R (a) as grounds for revocation of Snape's license: 1) §162R (a)(1), "providing incorrect, misleading, incomplete or materially untrue information in the license application; 2) §162R (a)(2), in pertinent part, "violating any insurance laws or regulations"; 3) §162R (a)(3), "obtaining or attempting to obtain a license through misrepresentation or fraud"; 4) §162R (a)(7), "admitting or being found to have committed any insurance unfair trade practice or fraud; and 5) §162R (a)(8), "using fraudulent, coercive or dishonest practices, or demonstrating incompetence, untrustworthiness or financial irresponsibility in the conduct of business in the commonwealth or elsewhere." Finally, the Division argues that the acts that form the basis for the AOTSC occurred while Snape was licensed as an insurance agent and an insurance broker, and that those acts demonstrate that Snape does not satisfy the statutory requirements of trustworthiness, competence and suitability, as set out in G. L. c.175, §§163 and 166.

I find that the record fully supports three of the grounds for revocation identified by the Division.[3] On the basis of my findings of fact, and conclusions that those facts demonstrate that Snape engaged in unfair and deceptive practices that violate G.L. c. 176D, §2, and that he violated §162N (c), I find that the Commissioner has cause to revoke his producer's license under §162R (a)(2). A finding that Snape has committed an unfair trade practice also permits license revocation pursuant to §162R (a)(7). I further find that the marketing of an uninsured health plan demonstrates incompetence and untrustworthiness in the business of insurance, and permits revocation of Snape's license pursuant to §162R (a)(8). For all those reasons, I conclude that Snape's insurance producer license should be revoked. I further find that he should be prohibited from transacting any insurance business, directly or indirectly, in Massachusetts, and that he should be required to dispose of any interest he may have in any insurance business.

[3] Although the Division refers in its memorandum in support of its motion for summary judgment to violations of §162R (a)(1) and (a)(3) as grounds for revoking Snape's license, neither the OTSC nor the AOTSC alleged that Snape was the target of any prosecution or that he had misrepresented his criminal history on an application.

ORDERS

Accordingly, after due notice, hearing and consideration it is

ORDERED: That any and all insurance producer licenses issued to John W. Snape by the Massachusetts Division of Insurance, and any appointments based on his status as a licensed producer, or former status as a licensed agent or broker, are hereby revoked; and it is

FURTHER ORDERED: that John W. Snape shall return to the Division any licenses in his possession, custody or control; and it is

FURTHER ORDERED: that pursuant to G. L. c. 175, §166B, John W. Snape shall forthwith dispose of any interest as proprietor, partner, stockholder, officer or employee of any licensed producer; and it is

FURTHER ORDERED: that John W. Snape is, from the date of this order, prohibited from acting as an insurance producer, broker or agent in Massachusetts; and it is

FURTHER ORDERED: that John W. Snape shall pay fines totaling Twenty-six Thousand Dollars ($26,000) to the Division of Insurance; and it is

FURTHER ORDERED: that John W. Snape shall make restitution totaling Four Thousand Eight Hundred Sixty-one Dollars and Thirty-three Cents ($4,861.33) for unpaid medical claims submitted to Employers Mutual by individuals.

This decision has been filed this first day of July 2004, in the office of the Commissioner of Insurance. A copy shall be sent to Snape by certified mail, return receipt requested, as well as by regular first class mail, postage prepaid.

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Jean F. Farrington
Presiding Officer

Pursuant to G.L. c. 26, §7, this decision may be appealed to the Commissioner of Insurance.